Supreme Court, U.S.
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No.00-921

In the Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY,

Petitioner,

v.

WORLDCOM TECHNOLOGIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

This cross-petition seeks review of the Seventh Circuit's decision in *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999). On March 5, 2001, this Court granted certiorari in No. 00-878, in which the Illinois Commerce Commissioners sought review of the same decision below. Earlier this week, this Court issued a *per curiam* opinion dismissing the writ of certiorari in No. 00-878 as improvidently granted. *Mathias* v. *WorldCom Technologies, Inc.*, ___ U.S. ___, slip op. at 2, 2002 WL 1008881 (U.S. May 20, 2002).

On the same day, in *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, Nos. 00-1531 & 00-1711, ___ U.S. ___, 2002 WL 1008485 (U.S. May 20, 2002), this Court held that there is "no doubt that federal courts have jurisdiction under § 1331" to decide a claim that "the Commission violated the Act and [an] FCC ruling when it ordered payment of reciprocal compensation for ISP-bound calls." Opinion of the Court at 6. In *Verizon*, this Court also held that a lawsuit asserting such a claim "may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*." *Id.* at 8.

However, the Court did not reach in *Verizon* the question presented in Ameritech's cross-petition — namely, whether a claim that a state commission's misinterpretation of the binding terms of a section 252 interconnection agreement that expressly limit the parties' rights and obligations to the scope of their obligations under federal law is governed by federal or state law. See Opinion of the Court at 10 ("it may (or may not) also be true that state contract law, and not federal law as Verizon contends, applies to disputes regarding the interpretation of Verizon's agreement"); Opinion of Souter, J., joined by Ginsburg and Breyer, J.J., concurring, at 2 n.4 ("Whether the interpretation of a reciprocal-compensation provision in a privately negotiated interconnection agreement presents a

federal issue is a different question which neither the Court nor I address at the present"). As demonstrated in Ameritech's cross-petition, that issue has created enormous confusion and spawned considerable litigation in the federal courts across the country. Some courts, including the Seventh Circuit in the decision below, have adopted the view that a claim that a state commission has disregarded the terms of a section 252 interconnection agreement arises under state law and must be decided in the state courts. Other courts, and significantly the FCC in its recent decision in *Starpower Communications, LLC* v. *Verizon South, Inc.*, FCC 02-105 (Apr. 8, 2002) ("*Starpower II*"), have taken the view that such a claim is federal in nature and can be litigated in federal court. The pending cross-petition squarely presents this important and pervasive issue in a ripe case. This Court should grant the petition and resolve the question that it left open in *Verizon*.

DISCUSSION

The critical question that remains unanswered after *Verizon* is whether a claim that a state commission has nullified the provisions of a section 252 interconnection agreement that expressly limit the parties' rights and obligations to the requirements of federal law constitutes an ordinary issue of state contract law reviewable in state court (as the Seventh Circuit held in the decision below) or an issue of federal interest and concern reviewable in federal court (as the FCC recently held in *Starpower II*). This question raises an issue of utmost importance because countless section 252 agreements include provisions that purposely set forth the parties' duties in terms of the requirements of the federal Act. Indeed, the agreements at issue in this case and in *Starpower II* have such provisions, as did the agreements at issue in *Verizon*.[1] This Court's urgent

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[1] Here, for example, the reciprocal compensation provisions chosen by Ameritech and its competitors state that the parties' reciprocal compensation obligations are "As Described in the Act" (J.A. in No. 00-878 at 8a, 14a, 20a, 30a, 38a; C.A. SA48, SA57, SA80, SA89;

attention to this issue is warranted because the federal courts (and the FCC) are in disarray with respect to the proper forum for resolving disputes over the interpretation of the terms of those agreements.

Contrary to the Seventh Circuit's view, a section 252 interconnection "agreement" is not an ordinary, voluntary commercial contract governed by state law. Rather, a section 252 agreement is a federal regulatory vehicle, created by Congress for the sole purpose of implementing the rights and obligations created by the federal Telecommunications Act of 1996 ("the 1996 Act"). As this Court has recognized, the 1996 Act imposes on incumbent local exchange carriers "a host of duties intended to facilitate market entry" by competitors. *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999). Among other things, "the incumbent LEC *must* 'provide * * * interconnection with' the incumbent's existing network, § 251(c)(2), and the carriers *must* then establish 'reciprocal compensation arrangements' for transporting and terminating the calls placed by each others' customers, § 251(b)(5)." *Verizon*, Nos. 00-1531 & 00-1711, Opinion of the Court at 2

SA100), which is in turn defined in each agreement to mean "as described in or required by the Act" (J.A. in No. 00-878 at 8a, 13a, 19a, 30a, 37a; C.A. SA39, SA53, SA71, SA85, SA96). The agreements between Starpower and Verizon Virginia at issue in the FCC's recent *Starpower II* decision contained similar reciprocal compensation terms. One of those agreements defined reciprocal compensation to be "as described in the Act," which is defined to mean "as described in or required by the Act." Compare *Starpower II* ¶¶ 6, 29 n.96 with J.A. in No. 00-878 at 8a, 13a-14a, 19a-20a, 30a, 37a-38a. And the reciprocal compensation provisions of both Starpower-Verizon Virginia agreements in *Starpower II* (see ¶¶ 6, 7, 12, 31), like the language in the Ameritech agreements at issue here, tracked the language of the Act and the FCC's rule interpreting the Act. The agreement in *Verizon* also is substantively identical to the agreements involved in *Starpower II*. See Post-Argument Supp. Br. of Verizon Maryland in Nos. 00-1531 & 00-1711 at 3 & n.1.

(emphasis added). Interconnection agreements are the means of accomplishing those federal mandates and constitute the "binding" statement of the parties' rights and obligations under the Act. 47 U.S.C. § 252(a)(1).

The forced sharing of facilities by business rivals under the Act creates an unusual competitive environment, pursuant to which incumbents naturally will not give more – and competitors naturally will not accept less – than the Act requires. In these circumstances, it is not surprising that the terms of section 252 agreements frequently track the requirements of federal law and "represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). And where interconnection agreement terms "reveal an intent to track the Commission's interpretation of the scope of section 251(b)(5)," the FCC has held that "whatever the Commission determines is compensable under section 251(b)(5) will be what is compensable under the Agreements." *Starpower II* ¶ 31.

Notwithstanding the fact that the interconnection terms at issue implement the reciprocal compensation requirements of the federal Act and expressly limit the parties' obligations to those federal law requirements, the Seventh Circuit held that "[a] decision 'interpreting' an [interconnection] agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999); Pet. App. 17a. Accordingly, the court refused to decide Ameritech's claim that the Illinois Commerce Commission nullified binding, federal-law based, limitations on the scope of Ameritech's obligation to pay reciprocal compensation under section 251(b)(5) of the Act. In *Starpower*, the FCC, standing in the shoes of a state commission pursuant to section 252(e)(5) of the Act, addressed precisely the same claim: "whether the existing interconnection agreements between Starpower and GTE and

Bell Atlantic require GTE and Bell Atlantic to pay compensation to Starpower for the delivery of ISP-bound traffic." *In re Starpower Communications, LLC*, 15 F.C.C.R. 11277 ¶ 9 (2000). But, in contrast to the Seventh Circuit, the FCC determined that such a claim presented a *federal* question that could be resolved by a *federal* agency under section 252(e)(5), subject to exclusive review in a *federal* court of appeals under section 252(e)(6) of the Act. And, in concluding that "Virginia law *supplies the applicable rules* of contract interpretation" (*Starpower II* ¶ 24 emphasis added)), the FCC followed this Court's frequent practice of borrowing state law as "the *federal* rule of decision" even though the "source of law is *federal*." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 718, 728 (1979) (emphasis added).[2]

The decision below and *Starpower* are merely illustrative of the pervasive confusion in the lower courts and the FCC over the question whether a claim that a state commission has nullified a term of a "binding" federally-mandated interconnection agreement that limits the parties' obligations to the requirements of the federal Act should be decided in state or federal court.[3] As demonstrated in Ameritech's cross-petition,

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[2] See also *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97-98 (1991) (holding that although the rule of decision for a private cause of action under a federal statute "is necessarily federal in character," federal courts should "'incorporat[e] [state law] as the federal rule of decision'") (quoting *Kimbell Foods*, 440 U.S. at 728).

[3] Congress simply could not have meant for interconnection disputes arising from the same agreement to run the gauntlet of two separate judicial systems, as the Seventh Circuit would require, with some issues litigated first in the federal system and other issues litigated years later in the state system, and with wasteful arguments over which issues fall on one side or another of the federal-state divide. See *Bank One Chicago* v. *Midwest Bank & Trust Co.*, 516 U.S. 264, 275-276 (1996) (refusing to fragment jurisdiction under federal statute; "even if the text of [the statute] could plausibly be red to

the disarray in the circuits as to the proper rationale and result in such cases is widespread and identical claims are reviewed in different court systems depending on the circuit in which the claim was brought. See Pet. at 13-23; Reply Br. at 1-6. And since the cross-petition was filed, the confusion in the circuits has only deepened. See, *e.g.*, *BellSouth Telecomms., Inc.* v. *MCImetro Access Transmission Servs., Inc.*, 278 F.3d 1223, 1232-37, 1243 (11th Cir. 2002) (holding not only that a claim challenging a state commission interpretation of an interconnection agreement "is a simple matter of common law contract interpretation," but also that federal law does not authorize state commissions to interpret and enforce an interconnection agreement at all). This Court should grant the cross-petition to decide the important question presented that, absent this Court's guidance, will continue to vex the lower courts.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted and the case set for briefing and argument. In the alternative, the petition for a writ of certiorari should be granted and the decision below should be vacated and remanded for further proceedings in light of *Verizon*.

Respectfully submitted.

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create this decidedly inefficient jurisdictional scheme, we would hesitate to attribute such a design to Congress").